

NOV 22 2005

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**PACIFIC WALLBOARD & PLASTER
COMPANY,**

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

No. 04-35511

D.C. No. CV-03-01562-PA

MEMORANDUM*

**Appeal from the United States District Court
for the District of Oregon
Owen M. Panner, Senior Judge, Presiding**

Submitted November 18, 2005
Portland, Oregon**

Before: GRABER and RAWLINSON, Circuit Judges, and OTERO,*
District Judge.**

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

*** The Honorable S. James Otero, United States District Judge for the Central District of California, sitting by designation.

Plaintiff Pacific Wallboard & Plaster Co. appeals the district court's grant of summary judgment for the government. On de novo review, Buono v. Norton, 371 F.3d 543, 545 (9th Cir. 2004), we affirm.

1. Plaintiff cannot show that it had reasonable cause for its failure timely to deposit and pay employment taxes for each quarter in the years 1998 through 2000. See 26 U.S.C. §§ 6651(a)(1)-(2), 6656(a). Although one of Plaintiff's employees embezzled funds, that crime does not automatically entitle Plaintiff to a refund, because the employee was not in charge of the corporation and was subject to oversight. Conklin Bros. of Santa Rosa, Inc. v. United States, 986 F.2d 315, 318 (9th Cir. 1993). Plaintiff failed to exercise "ordinary business care and prudence," Treas. Reg. § 301.6651-1(c)(1) (as amended in 2000), because it failed to hire outside auditors and did not review the employment tax returns.

2. Plaintiff also cannot show that the financial difficulties that resulted from the embezzlement constituted reasonable cause for its failure timely to pay its employment taxes. Plaintiff failed to present specific evidence of the funds that it had available on each date on which the employment taxes were due and failed to account for the expenditures that it made in lieu of paying its taxes. Synergy Staffing, Inc. v. IRS, 323 F.3d 1157, 1160 (9th Cir. 2003). To the contrary, Plaintiff's financial records show that it had positive balances in its accounts for

most periods at issue and that it earned a profit for all the years at issue. We also note that reasonable cause is more difficult to establish when the delinquent taxes are being paid on behalf of employees, as is the case here. Treas. Reg. § 301.6651-1(c)(2) (as amended in 2000).

AFFIRMED.